



**In the
Supreme Court of the United States.**

OCTOBER TERM, 1977.

No. **77-1388**

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

CHARLES F. WHITE,
RESPONDENT.

**Petition for a Writ of Certiorari to the Supreme Judicial Court
of the Commonwealth of Massachusetts.**

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Opinion Below.

The opinion of the court below (App. A, *infra*, pp. 1a-10a)
is reported at Mass. Adv. Sh. (1977) 2805.

Jurisdiction.

The decision of the court below was entered on December 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether statements held inadmissible at trial because there was no intelligent waiver of *Miranda v. Arizona* safeguards may be used to establish probable cause for the issuance of a search warrant?

Constitutional Provision Involved.

FIFTH AMENDMENT.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case.

PRIOR PROCEEDINGS.

On May 20, 1978, Charles White, after a jury-waived trial, was found guilty on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana, amphetamines, cocaine and L.S.D., in violation of Mass. Gen. Laws, c. 94C, § 31. Prior to trial, the defendant filed a motion to suppress all oral and written statements taken from him at the time of and following his arrest, and all evidence seized from his automobile following his arrest. After a pre-trial hearing, the trial judge issued *Findings and Rulings* on the motion to suppress in which he concluded that the statements must be suppressed, but that the drugs and currency seized pursuant to a search warrant in the defendant's car were admissible (App. B, *infra*, pp. 11a-19a).

On appeal, the Supreme Judicial Court reversed and set aside the trial court's *Findings and Rulings* on the admissibility of the evidence resulting from the search of the automobile. *Commonwealth v. White*, Mass. Adv. Sh. (1977) 2805.

STATEMENT OF FACTS.

The facts as found by the trial judge, and as adopted by the Supreme Judicial Court, are as follows:

On March 28, 1975, at about 2 a.m., the chief of police of Ashfield, Massachusetts was notified that an automobile accident had occurred. He proceeded to the scene and found a car which had gone off the road and over an embankment, hitting several posts. The defendant was behind the wheel of the car, trying to drive it back over the embankment and onto the

highway. As the chief approached the car, the defendant asked him to help, stating that he thought that with a "push" he could "make it over the embankment." (App. A, p. 2a; App. B, p. 11a.)

Chief Zalenski, however, noticed that the defendant appeared to be under the influence of either drugs or alcohol, or both. His eyes appeared glassy, his speech was somewhat slurred, and there was a strong odor of alcohol on his breath. The chief accordingly ordered him from the motor vehicle, read him the *Miranda* warnings, and placed him under arrest. He told the defendant to follow him to his cruiser, and although the defendant staggered a bit as he did so, he was able to walk up the embankment without assistance. Chief Zalenski then called the Massachusetts State Police for assistance. (App. A, p. 2a; App. B, pp. 11a-12a.)

Trooper Taliaferro of the Massachusetts State Police responded to Chief Zalenski's call. When he arrived at the scene, the chief told him that the defendant was under arrest and asked him to give the defendant a breathalyzer test at the State Police barracks. Both officers then proceeded to the barracks in their respective cruisers. Chief Zalenski took the defendant with him in his cruiser. (App. A, p. 2a; App. B, p. 12a.)

When the two officers and the defendant arrived at the State Police barracks, Trooper Taliaferro read the *Miranda* warnings to the defendant and advised him of his right to use a telephone. He also informed him, in accordance with G.L. c. 90, § 24(l)(f), that his license to operate a motor vehicle would be suspended for 90 days if he refused to submit to a breathalyzer test. The defendant responded that he "might as well" take the test since "I'll lose my license either way." He also attempted, however, to use a telephone in an effort to retain the services of a lawyer. (App. A, pp. 2a-3a; App. B, p. 12a.)

The defendant had some difficulty using the telephone. He dropped coins on the floor several times while attempting to do so. He did succeed in completing two calls, one to an attorney whom he asked to represent him, but was unable to obtain the services he sought. After a period of about 40 to 50 minutes, the breathalyzer test was administered by Trooper Taliaferro. The test indicated that the percentage, by weight, of alcohol in the defendant's blood was, at that time, thirteen one hundredths.¹ (App. A, p. 3a; App. B, p. 12a.)

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the defendant in a cell. Before doing so he searched the defendant's person and found what appeared to be a marihuana cigarette in his shirt pocket. At that time the trooper told him that he would also be charged with possession of marihuana, and he again read the *Miranda* warnings to him. The defendant responded that he saw nothing wrong in the possession of one marihuana cigarette. The officer then asked him if he had any other marihuana on his person or in his car, and the defendant responded that he had more marihuana in his car. The defendant then stated that he could name some "biggies,"² but Trooper Taliaferro told him that he did not want him to say anything further. (App. A, p. 3a; App. B, p. 13a.)

After the defendant was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application. The affidavit read, in material part, as follows:

"On March 28, 1975 I assisted Chief Walter Zalenski [sic] Ashfield PD with a subject under arrest for operating

¹ The results of the test created a statutory presumption that the defendant was under the influence of intoxicating liquor. G.L. c. 90, § 24(l)(e).

² The defendant was apparently referring to certain drug dealers whom he was willing to identify in exchange for leniency.

under the influence. I gave the defendant, Charles F. White his miranda [sic] rights. I than [sic] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [sic]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest." (App. A, p. 4a; App. B, p. 13a.)

A warrant for a search of the defendant's motor vehicle was issued on the basis of the application and the supporting affidavit. Upon a search of the vehicle a substantial quantity of various controlled substances plus \$3,195 in cash³ was discovered in the vehicle's trunk. (App. A, p. 4a; App. B, pp. 13a-14a.)

Reasons for Granting the Writ.

The petitioner argues the following reasons why this petition for writ of certiorari should be granted:

1. The petition presents a novel question of law not previously addressed by this Court.
2. The decision of the court below represents an unwarranted expansion of the exclusionary rule enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966), which is in conflict with the spirit of *Michigan v. Tucker*, 417 U.S. 433 (1974).

³The cash was in a strong box which was found in the trunk.

STATEMENTS WHICH ARE HELD TO BE INADMISSIBLE AT TRIAL, AS A RESULT OF A VIOLATION OF *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966), MAY BE USED TO ESTABLISH PROBABLE CAUSE SUFFICIENT TO OBTAIN A VALID SEARCH WARRANT.

The Supreme Judicial Court upheld the trial court's finding that the defendant's statement must be suppressed as the Commonwealth had not met its burden of demonstrating that the defendant knowingly or intelligently waived his right to counsel or his privilege against self-incrimination. The court further held that the statements could not be used in support of the application for the search warrant. It is from this ruling that the Commonwealth seeks certiorari.

A. *Miranda v. Arizona*, 384 U.S. 436 (1966), does Not Establish a Per Se Rule that Evidence, Seized in Violation of the Principles Set Forth Therein, Must be Excluded from All Proceedings.

The Supreme Judicial Court, the Commonwealth submits, has adopted a per se approach to *Miranda* which stretches the application of the exclusionary rule far beyond the outer limits of that decision. Such an approach is at odds with rulings of this Court.

In *Harris v. New York*, 401 U.S. 222 (1971), this Court held that a statement of an accused taken in violation of *Miranda* could be used to impeach the direct testimony of the accused at trial. The Court stated:

"It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

Again, in *Michigan v. Tucker*, 417 U.S. 433 (1974), this Court held admissible at trial the testimony of a witness whom the police discovered as a result of the defendant's statement which had been taken in violation of *Miranda*. See also *United States v. Janis*, 428 U.S. 433 (1976).

The Commonwealth submits that *Michigan v. Tucker* controls the instant case. The only significant difference involves the type of evidence to be offered at trial. In the instant case, real evidence was seized. Factors which strengthen the argument for admission here are that the real evidence carries with it greater indicia of trustworthiness than the oral testimony held admissible under *Tucker*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring), and that it was seized pursuant to an otherwise valid warrant.

Evidence, although inadmissible at trial, has traditionally been an appropriate basis for determining probable cause for a search warrant. *Spinelli v. United States*, 393 U.S. 410 (1969) (hearsay). The fact that the statements were later held to be inadmissible at trial (the only sanction specifically required by *Miranda*) should not render them impermissible for a determination that probable cause exists for the issuance of a search warrant. It would be particularly inappropriate to do so where, as here, the search warrant was applied for in good faith.

Moreover, the central purpose of the exclusionary rule is to deter police misconduct.

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan v. Tucker*, *supra*, at 447.

In the instant case there is no element of deliberate police misconduct involved. In fact, the trial judge found: "In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*" (App. B, p. 18a). The defendant was read his rights on at least three occasions. The only interrogation of the defendant consisted of a single question put to him in response to an unsolicited statement by him that he did not think possession of a single marijuana cigarette was a crime. There is nothing in the record to indicate any dishonesty of purpose or effort to coerce the defendant on the part of the police.

It is difficult, the Commonwealth submits, to determine what deterrent effect the exclusion of the evidence seized from the defendant's automobile would have on future police conduct. Admission of the evidence would not, the Commonwealth submits, imply judicial sanction of the initial constitutional violation, as the Supreme Judicial Court suggests. *Commonwealth v. White*, at 2812 (App. A, p. 7a). The defendant's statements, in strict accordance with *Miranda*, were suppressed prior to trial.

Applying the balancing test of *Janis*, *supra*, and *Tucker*, *supra*, compels a result contrary to that reached by the Supreme Judicial Court. The Commonwealth suggests that, in the instant case, the interest of the public in having a defendant's guilt or innocence determined on the basis of trustworthy evidence outweighs the need to deter improper police misconduct. In this case, there is no indication of any coercive conduct or involuntary statements by the defendant. The court found only that the Commonwealth had not proven that the defendant had intelligently waived his rights (App. B, pp. 14a, 19a). Indeed, the Supreme Judicial Court stated ". . . the more prudent and constitutionally preferable course would have been for the police to withhold any further questioning 'until [the defendant] was clearly capable of responding intelligently.'" *White*, *supra*, at 2811 (App. A, p. 6a).

Where the alleged violation of *Miranda* is of such a non-egregious nature, to require a blanket application of the exclusionary rule is, the Commonwealth suggests, overkill and is not compelled by federal standards.⁴

"I tend generally to share the view that the *per se* application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. . . ." *Brewer v. Williams*, 430 U.S. 387, 413-414 n. 2 (1977) (concurring opinion of Mr. Justice Powell).

⁴The court in *White* at 2812 (App. A, p. 7a) refers to its prior decision in *Commonwealth v. Haas*, ____ Mass. ____ (1977), Mass. Adv. Sh. (1977) 2212, as necessarily requiring extension of the exclusionary rule to the instant case. The Commonwealth submits that, as in the instant case, the same *per se* application of the exclusionary rule was applied by the court in *Haas*, leading to the conclusion:

"Where probable cause is established pursuant to a violation of *Miranda*, the arrest is invalid." *Haas* at 2225.

The court based its decision on its interpretation of federal constitutional requirements and not on state law. The Commonwealth submits that *Miranda* did not require such a ruling. See *Haas* at 2236 (concurring opinion, Braucher, J.).

The Commonwealth recognizes that the Fifth Amendment is implicated in the instant case, but suggests that a contrary approach is not mandated. This case simply does not involve any conduct on the part of the police which has been or could be deemed to constitute an intentional attempt to deny the defendant his constitutional rights. Compare *Brewer v. Williams*, *supra*.

Therefore, the Commonwealth submits that the deterrent purpose of the exclusionary rule would have little effect in this case, for there was no intention to violate any rights of the defendant.

B. *The "Fruits of the Poisonous Tree" Doctrine was Improperly Applied to the Instant Case.*

The Commonwealth recognizes that this Court has stated that in a proper case the rationale of *Wong Sun v. United States*, 371 U.S. 471 (1963), could be applied to Fifth Amendment violations as well as Fourth Amendment violations. *Michigan v. Tucker*, *supra*, at 447.

However, the Commonwealth submits that the *proper* case for such application is one in which statements are extracted from a defendant as a result of coercive or intentional bad-faith actions on the part of the police. *United States ex rel. Hudson v. Cannon*, 529 F. 2d 890 (7th Cir. 1976). *United States v. Payner*, 434 F. Supp. 113 (N.D. Ohio 1977). Moreover, such a requirement is consistent with the purpose of the exclusionary rule for, as the court has stated,

"The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Elkins v.*

United States, 364 U.S. 206, 217 (1960).” *United States v. Calandra*, 414 U.S. 338, 347 (1974).

It follows that, in order to effectuate this purpose, some intentional bad-faith conduct must be involved for sanctions in this case to have future effect.

Moreover, it is only in such cases, involving intentional bad faith or coercive conduct, that it may reasonably be said there is a significant danger that the evidence obtained in violation of *Miranda* will be unreliable. “When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule has also been asserted: protection of the courts from reliance on untrustworthy evidence.” *Michigan v. Tucker*, at 448.

The Commonwealth submits that the application of the *Wong Sun* doctrine by the Supreme Judicial Court violates the rationale of *Michigan v. Tucker* and has the effect of requiring that police officers conducting good-faith investigations make no mistakes at all.

Therefore, where application of the exclusionary rule would have little practical deterrent effect, where there was no coercive activity by the police which would render the statements involuntary and thereby untrustworthy, the logic of *Michigan v. Tucker* would allow use of the statements for the purpose of establishing probable cause for issuance of a search warrant. The Supreme Judicial Court has erred in applying *Miranda v. Arizona* as requiring per se exclusion of statements obtained in violation of that decision from consideration as to probable cause for the issuance of a search warrant.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

COMMONWEALTH vs. CHARLES F. WHITE.

Franklin. May 5, 1977. — December 30, 1977.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & LIACOS, JJ.

Search and Seizure. Probable Cause. Constitutional Law, Search and seizure, Probable cause, Waiver of constitutional rights. Practice, Criminal, Suppression of evidence. Waiver.

INDICTMENTS found and returned in the Superior Court on September 9, 1975.

A pre-trial motion to suppress evidence was heard by Moriarty, J., and the cases were heard by Cross, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Robert S. Cohen for the defendant.

John M. Finn, Assistant District Attorney (Stephen R. Kaplan, Assistant District Attorney, with him) for the Commonwealth.

LIACOS, J. In a jury waived trial held pursuant to the provisions of G. L. c. 278, §§ 33A-33G, the defendant was found guilty on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana (Class D); cocaine (Class B); amphetamines (Class B); and LSD (Class C). G. L. c. 94C, § 31. He was sentenced to not more than seven nor less than five years at the Massachusetts Correctional Institution at Walpole as to three of the convictions, the sentences to run concurrently. The marihuana conviction was filed. The defendant appealed to the Appeals Court and we transferred the case here on our motion. We reverse the convictions.

The only point we need consider on this appeal is whether the trial judge was correct in denying the defendant's motion

to suppress evidence of controlled substances, related paraphernalia; and the contents of a strongbox (\$3,195) found in a search of the trunk of the defendant's car. The search was pursuant to a search warrant, the affidavit in support of which was based on statements which the judge held should be suppressed as they were obtained in violation of the commands of *Miranda v. Arizona*, 384 U.S. 436 (1966). The underlying facts found after a hearing on the defendant's motion are set forth in the judge's findings and rulings on the matter. We state the facts, as embodied therein, necessary for our decision.

At approximately 2 A.M., on March 28, 1975, the chief of police of the town of Ashfield responded to a report of a motor vehicle accident. The defendant's automobile had apparently gone off the road over an embankment, hitting several posts. The chief of police found the defendant in his vehicle alone trying to get his car back on the road. The defendant's behavior and appearance gave the chief reason to believe that the defendant was operating under the influence of drugs or alcohol, or both, whereupon he ordered the defendant out of the car, placed him under arrest for operating under the influence, and gave him the warnings required by *Miranda v. Arizona*, *supra*. At this point, he ordered the defendant to walk up to the police cruiser, a task the defendant accomplished without assistance, but with some degree of staggering.

Responding to a call for assistance from the chief of police, an officer of the State police met him at the accident scene. After arranging to have the defendant's car towed to the State police barracks at Shelburne Falls, he returned to the barracks. The chief of police had transported the defendant to the same State police barracks for the purpose of having a breathalyzer test administered to the defendant. When the trooper arrived at the barracks, he read the defendant his

Miranda rights. He advised the defendant of his right to a breathalyzer test and of the consequences of his refusal to submit to the same, G. L. c. 90, § 24 (1) (f), of his right to a blood test by a physician of his own choice, and of his right to make a telephone call. The defendant agreed to submit to the breathalyzer test.

Prior to the administration of the test, the defendant attempted to retain the services of an attorney through the use of a coin operated telephone. In the course of the attempts to reach an attorney the defendant experienced some difficulty, dropping coins on the floor several times. There was evidence from the trooper that the defendant "bounce[d] around," "climb[ed] the walls," was scratching himself in an unusual way, and "didn't know what he was doing." After these attempts to reach an attorney were unsuccessful, the defendant took the test, the results of which were sufficient to invoke the statutory presumption that the defendant was driving under the influence of intoxicating liquor. G. L. c. 90, § 24 (1) (e).

At this point, the trooper prepared to place the defendant in a holding cell. Before doing so, the trooper searched the defendant's person and discovered what appeared to be a marihuana cigarette in the defendant's shirt pocket. The trooper then informed the defendant that he would also be charged with possession of marihuana. He gave the defendant his Miranda warnings once more. The defendant responded that he saw nothing wrong with the possession of one marihuana cigarette. The trooper then asked the defendant if he had any other marihuana on his person or in his car, and the defendant replied that he had some marihuana in his car. The defendant also stated that he could name some "biggies," to which the trooper replied that he did not wish to inquire any further.

Armed with the information gained from the defendant's statements, the trooper prepared an application for a search

warrant to search the defendant's vehicle, by then located at the State police barracks. The affidavit stated in material part: "On March 28, 1975 I assisted Chief Walter Zalenski [sic] Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [sic] rights. I than [sic] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [sic]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White, stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant was issued on the basis of the affidavit. A search of the trunk of the vehicle pursuant thereto resulted in the discovery of a substantial quantity of controlled substances, related paraphernalia, such as glassine bags and cigarette wrappers and a strongbox containing a substantial amount of cash. It was this property as well as the defendant's statements that was the subject of the defendant's suppression motion.

The judge concluded that the defendant's statements must be suppressed as the Commonwealth had not met its heavy burden of demonstrating that the defendant had knowingly or intelligently waived his right to counsel or his privilege against self-incrimination. Relying primarily on *Commonwealth v. Hosey*, 368 Mass. (1975) [Mass. Adv. Sh. (1975) 2732], he reasoned that the defendant's condition precluded him from making an effective waiver. Despite this ruling, however, he declined to order the suppression of the physical objects, including the controlled substances seized in the defendant's car. The judge reasoned that the defendant's statements could be used in support of the application for the search warrant since he did not believe the policies behind the exclusionary rule would be furthered by its application in this context. He found that the officers were scrupulous in observing the de-

fendant's rights and that the statement as to the location of the controlled substances in the vehicle did not come about as a result of police subterfuge or any purposeful attempt to subvert the defendant's rights.

The essence of the defendant's arguments here may be summarized as follows: (a) the judge correctly ordered the suppression of the defendant's inculpatory statements; (b) the judge correctly ruled that without the defendant's statements the application for the warrant failed to establish probable cause; and (c) since the warrant was invalid, the search of the car was illegal and the objects seized therein should have been suppressed. The Commonwealth's answer to these claims is that (a) the judge was wrong in ordering suppression of the defendant's statements; (b) the affidavit in support of the search warrant, even without such statements, demonstrates probable cause (contrary to the judge's ruling); and (c) if the warrant is ruled invalid, the search is still valid as a warrantless car search or, alternatively, as an inventory search of an impounded vehicle. We turn first to the threshold issue of the propriety of the suppression of the defendant's statements, and the effect thereof.

1. The Commonwealth appears to urge that we reexamine the factual determination of the judge relative to the suppression of the defendant's statements. The claim is that the judge erroneously found that the defendant did not intelligently and voluntarily waive his rights under *Miranda*. It has sought to distinguish *Commonwealth v. Hosey*, *supra*, relied on by the judge below, in numerous ways and point to our recent decision in *Commonwealth v. Fielding*, Mass. (1976) [Mass. Adv. Sh. (1976) 2290], as limiting the *Hosey* case to extreme circumstances of loss of cognitive ability.

It is well established that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), quoting

from *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). Thus, when inculpatory statements are made by a defendant in a situation like that presented in the instant case, "a heavy burden rests on the [prosecution] to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, *supra* at 475. *Commonwealth v. Cain*, 361 Mass. 224, 228 (1972).

The Commonwealth's argument founders on the well established principle of appellate review that where, as here, subsidiary findings of fact have been made by a trial judge, they will be accepted by this court absent clear error. *Commonwealth v. Hosey*, *supra*. See *Commonwealth v. Murphy*, 362 Mass. 542 (1972). Such findings as to intelligent and voluntary waiver, or the absence thereof, are entitled to substantial deference by this court. *Commonwealth v. Roy*, 2 Mass. App. Ct. 14, 19 (1974). Having heard the evidence, the judge specifically found that the defendant had "affirmatively demonstrated a desire for the assistance of counsel" and had "at no time indicated . . . he had changed his mind" in that regard. The judge also found that the State trooper did not regard the defendant as having waived his right to silence or his right to counsel. On those facts alone it would be a difficult task for the Commonwealth to establish that the defendant had waived his right to counsel. *Brewer v. Williams*, 430 U.S. 387 (1977). If one considers, as did the judge, the evidence of the defendant's being under the influence, established through the breathalyzer test, and his behavior, it is clear that the more prudent and constitutionally preferable course would have been for the police to withhold any further questioning "until [the defendant] was clearly capable of responding intelligently." *Commonwealth v. Hosey*, *supra* at [Mass. Adv. Sh. (1975) at 2743]. While the case before us is not so compelling as was the situation in *Hosey*, we cannot

conclude that the judge erred in finding that the Commonwealth's heavy burden had not been satisfied.

2. It follows that we must then consider whether such statements, despite their inadmissibility at trial, could be used for the purpose of establishing probable cause sufficient to obtain a valid search warrant. Unlike the trial judge, we conclude that they may not.

In *Commonwealth v. Hall*, 366 Mass. 790, 795 (1975), we recognized that evidence obtained in violation of constitutional guaranties against illegal search and seizure may not be considered in determining whether there was probable cause to obtain a warrant. More recently, in *Commonwealth v. Haas*, Mass. (1977) [Mass. Adv. Sh. (1977) 2212], we held that evidence obtained in violation of the principles laid down in *Miranda v. Arizona*, *supra*, may not be considered in determining whether there is probable cause to make an arrest and thus validate a search made incident to the arrest.

From these cases it follows that neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would, in effect, sanction the initial violations of constitutional guaranties which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called "fruit of the poisonous tree" doctrine set forth in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and *Nardone v. United States*, 308 U.S. 338 (1939). Although this exact issue has not been determined by the Supreme Court, but cf. *Michigan v. Tucker*, 417 U.S. 433 (1974), we believe that *Haas* controls the issue in this Commonwealth. The policies underlying the "fruits" doctrine in the search and seizure area are even more compelling in the instant case. Evidence obtained in violation of the guaranty against unreasonable searches and seizures is more often than not reliable, probative evidence. *Schneckloth v.*

Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). While evidence obtained in violation of the Miranda guidelines may be similarly probative and reliable, there is a far more significant danger that it will not be so. *Miranda v. Arizona*, *supra* at 447, 455 & n. 24.

3. The judge ruled that the existence of probable cause to support the search warrant "unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband." We agree. It does not appear that the warrant, considered without the tainted evidence, is sufficient to establish probable cause. Cf. *Commonwealth v. Hall*, *supra*. Without the defendant's admission, the only evidence for the magistrate to consider was the allegation that the defendant was under arrest for driving under the influence and the marihuana cigarette was that found in his shirt pocket.

The lowest threshold of probable cause which we have previously accepted in a case of this kind was in *Commonwealth v. Miller*, 366 Mass. 387 (1974). In that case the facts were that the defendant was found with a small quantity of marihuana and uttered words which arguably indicated a consciousness of criminal conduct. A majority of the court found these facts sufficient to establish probable cause over the dissent of three Justices. In this case even less is present. Neither the possession of the small quantity of marihuana nor the fact that the defendant was thought to be operating under the influence of alcohol sufficiently establishes a nexus between the criminal activity sought to be investigated and the trunk of the vehicle. There is no necessary correlation between the untainted allegations in the affidavit and the presence of controlled substances in the defendant's car. At best, issuance of a warrant on such information alone would be a "hunch" on the part of the issuing magistrate, *Commonwealth v. Miller*, *supra* (Hennessey, J., dissenting), a level of

information not on a par with that required by the Constitution. This much was recognized by the judge and we see no reason to disagree.

4. This does not end our inquiry however. We indicated in *Commonwealth v. Blackburn*, 354 Mass. 200, 203 (1968), that a police officer should not be penalized for obtaining a search warrant, later ruled invalid, when there were adequate grounds to conduct a warrantless search. See *United States v. Darrow*, 499 F.2d 64, 68 (7th Cir. 1974). We consider whether the search here could be vindicated as a valid warrantless search.

In this case, no evidence was presented at the hearing on the motion which would justify this court in upholding the search as an inventory search, *South Dakota v. Opperman*, 428 U.S. 364 (1976);¹ *Cady v. Dombrowski*, 413 U.S. 433 (1973) (evidence of regular practice) or as the automobile equivalent of a "stop and frisk" search, *Commonwealth v. Almeida*, Mass. (1977) [Mass. Adv. Sh. (1977) 1799]. Nor can it be justified as a search incident to arrest. See *Chimel v. California*, 395 U.S. 752 (1969). Thus the search, if it is to be sustained at all, must be upheld as a permissible warrantless search of an automobile made on the basis of probable cause.

While the law concerning the proper parameters of warrantless automobile searches continues to be an area of vexing inconsistency and illogic, see *Commonwealth v. Haefeli*, 361 Mass. 271, 278 (1972), we have adhered to the view expressed in *Chambers v. Maroney*, 399 U.S. 42, 52 (1970), that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable

¹ We intimate no opinion as to whether we would choose to follow the rule in *Opperman*, since it is not applicable to the facts here. See *State v. Opperman*, S.D. (1976) (247 N.W.2d 673 [1976]).

cause to search, either course is reasonable under the Fourth Amendment." See *Commonwealth v. Miller, supra* (Hennessey, J., dissenting). *Chambers* also allows such searches based on probable cause to be conducted at the station house as opposed to requiring that they be made at the scene where the police initially encounter the motor vehicle. However, we have understood *Chambers* read in conjunction with *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), to require that the determination as to probable cause must be made at the time the automobile is first stopped, rather than on facts as may become available at a later time. *Commonwealth v. Rand*, 363 Mass. 554, 559 (1973). In this case, the facts available at the time of the first encounter would allow the officer to conclude that the defendant was driving under the influence of alcohol. Anything else was found at a point in time beyond that which we may permissibly consider under *Chambers* and *Coolidge*. *Commonwealth v. Rand, supra*. See, *United States v. Edwards*, 415 U.S. 800 (1974).

We do not believe that the mere fact that a person is apprehended for driving under the influence of an intoxicant is, without more, sufficient to allow a prudent man to conclude that a crime requiring a search of the automobile, its trunk, and the interior of a strongbox located therein has been committed. *Commonwealth v. Miller, supra* (Hennessey, J., dissenting). Cf. *United States v. Ragsdale*, 470 F.2d 24 (5th Cir. 1972). See *United States v. Chadwick*, U.S. (1977) [97 S. Ct. 2476 (1977)]. It therefore follows that a warrantless search cannot be considered permissible in these circumstances and that the judgments of the court below must be reversed.

Judgments reversed.
Findings set aside.

Appendix B.

Commonwealth of Massachusetts.
 Superior Court.

COMMONWEALTH vs. CHARLES F. WHITE.

Nos. 5697-5700.

Findings and Rulings in re Motion to Suppress Evidence.

In this case the defendant is charged on all four indictments with possession with intent to distribute certain controlled substances. The defendant has filed a motion to suppress all oral or written statements taken from him at the time of and following his arrest. A pre-trial evidentiary hearing was held on the defendant's motion. On the basis of the evidence presented at that hearing I hereby find the following facts.

On March 28, 1975 at about 2:00 o'clock A.M., Chief of Police Walter D. Zalenski of the police department of the Town of Ashfield was notified that an automobile accident had occurred on Route 116 in that town. He proceeded to the scene and found a car which had gone off the road and over an embankment, hitting several posts. The defendant was behind the wheel of the car, trying to drive it back over the embankment and onto the highway. As Chief Zalenski approached the car, the defendant asked him to help, stating that he thought that with a "push" he could "make it over the embankment."

Chief Zalenski, however, noticed that the defendant appeared to be under the influence of either drugs, alcohol, or both. His eyes appeared glassy, his speech was somewhat slurred, and there was a strong odor of alcohol on his breath. The chief accordingly ordered him from the motor vehicle,

read him the Miranda warnings, and placed him under arrest. He told the defendant to follow him to his cruiser, and although the defendant staggered a bit as he did so, he was able to walk up the embankment without assistance. Chief Zalenski then called the Massachusetts State Police for assistance.

Trooper Frederick Taliaferro of the Massachusetts State Police responded to Chief Zalenski's call. When he arrived at the scene, the chief told him that the defendant was under arrest and asked him to give the defendant a breathalyzer test at the State Police Barracks. Both officers then proceeded to the barracks in their respective cruisers. Chief Zalenski took the defendant with him in his cruiser.

When the two officers and defendant arrived at the State Police barracks, Trooper Taliaferro read the Miranda warnings to the defendant and advised him of his right to use a telephone. He also informed him, in accordance with G.L. c. 90, § 24(l)(f), that his license to operate a motor vehicle would be suspended for 90 days if he refused to submit to a breathalyzer test. The defendant responded that he "might as well" take the test since, "I'll lose my license either way." He also attempted, however, to use a telephone in an effort to retain the services of a lawyer.

The defendant had some difficulty using the telephone. He dropped coins on the floor several times while attempting to do so. He did succeed in completing two calls, one to an attorney whom he asked to represent, but he was unable to obtain the services he sought. After a period of about 40-50 minutes, the breathalyzer test was administered by Trooper Taliaferro. The test indicated that the percentage, by weight, of alcohol in the defendant's blood was, at that time, thirteen one hundredths.¹

¹The results of the test created a statutory presumption that the defendant was under the influence of intoxicating liquor. G.L. c. 90, § 24(l)(e).

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the defendant in a cell. Before doing so he searched the defendant's person and found what appeared to be a marijuana cigarette in his shirt pocket. At that time the officer told him that he would also be charged with possession of marijuana, and he again read the Miranda warnings to him. The defendant responded that he saw nothing wrong in the possession of one marijuana cigarette. The officer then asked him if he had any other marijuana on his person or in his car, and the defendant responded that he had more marijuana in his car. The defendant then stated that he could name some "biggies"², but Trooper Taliaferro told him that he did not want him to say anything further.

After the defendant was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application. The affidavit read, in material part, as follows:

"On March 28, 1975 I assisted Chief Walter Zalenski [sic] Ashfield PD with a subject under arrest for operating under the influence. I gave the defendant, Charles F. White his miranda rights. [sic]. I than [sic] searched the prisoner and found (1) marijuana cigarette in the breast pocket of his tee shirt colorgreen [sic]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant for a search of the defendant's motor vehicle was issued on the basis of the application and the supporting af-

²The defendant was apparently referring to certain drug dealers whom he was willing to identify in exchange for leniency.

fidavit. Upon a search of the vehicle a substantial quantity of various controlled substances plus \$3,195.00 in cash³ was discovered in the vehicle's trunk. That property was seized and is, together with the defendant's oral statements to Trooper Taliaferro, the subject of the motion to suppress evidence.

1. I am unable to find that the Commonwealth has met its "heavy burden" of demonstrating that this defendant had knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel at the time when he supplied Trooper Taliaferro with the incriminating information with regard to the presence of controlled substances in his motor vehicle. In the first place, he had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance. Although his attempts were unsuccessful (not surprising in view of the hour), he at no time indicated that he intended to abandon his efforts or that he had changed his mind with regard to that objective. Furthermore, it is apparent from Trooper Taliaferro's reaction that the officer did not regard the defendant as having waived his right to silence or his right to counsel. When the defendant offered to reveal the identity of certain alleged "biggies," the officer declined to question him further. That declination was made, I believe, in deference to the defendant's constitutional rights. Finally, the defendant was clearly under the influence of intoxicating liquor at the time when he made the inculpatory statement. Trooper Talliaferro described him as "bouncing off the walls," and the breathalyzer reading was sufficiently high to create a statutory presumption of intoxication. The Supreme Judicial Court has made it clear that when a suspect has been brought in on a charge of drunkenness, the

³The cash was found in a strong box which was found in the trunk.

police should not proceed with questioning on the basis of a waiver of *Miranda* rights until the suspect is "clearly capable of responding intelligently." (*Commonwealth v. Hosey*, 1975 A.S. 2732, ____ N.E. 2d ____). The same rule must apply when the suspect has been brought in on a charge of driving under the influence of either liquor or narcotic drugs. In this case that test had not been met when the defendant made his inculpatory statements. It follows that those statements must be suppressed as evidence at his trial.

2. A different issue, however, is presented by the motion insofar as it seeks suppression of the narcotic drugs and currency which were discovered in the trunk of the defendant's car. That property was discovered and seized in the course of a search that was authorized by a warrant issued by a duly-authorized magistrate. The affidavit that provided the basis for the issuance of that warrant clearly, I think, established probable cause to believe that the automobile which was the subject of the search contained contraband which was subject to such seizure. The existence of such probable cause, however, unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband — and that statement was obtained in violation of the defendant's *Miranda* rights. The question, I therefore suppose, is whether the results of the search must also be suppressed as "fruits of the poisonous tree." I do not think so.

In the first place, I am aware of no decision, binding upon me, in which it has been held that a statement obtained in violation of a suspect's *Miranda* rights may not be used to establish probable cause for the issuance of an otherwise valid search warrant. The industry of counsel on both sides of this particular issue has been unable to disclose a decision on that precise point. I am, of course, aware of the decision of the Supreme Court of the United States in *Wong Sun v. United*

States, 371 U.S. 471, but that case involved the reverse of the situation with which I am now faced. In *Wong Sun*, the product of a clearly illegal arrest and search was an inculpatory admission by the defendant. The same was true in the more recent case of *Brown v. Illinois*, ___ U.S. ___, 45 L. Ed. 2d 416, 95 S. Ct. ___ (June 26, 1975). In this case, a statement by the defendant (obtained in violation of *Miranda*) provided the probable cause for the issuance of an otherwise valid warrant.

The holding of the Supreme Court in *Miranda* (*Miranda v. Arizona*, 384 U.S. 434, 86 S.Ct. 1602, 16 L. Ed. 2d 694) did not expressly preclude the use of statements obtained without a knowing, intelligent and voluntary waiver of the prescribed warnings as a basis for probable cause for the issuance of a valid warrant. In that case the court promulgated a set of safeguards to protect the delineated constitutional rights of persons subjected to custodial police interrogation and held that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary. *Michigan v. Mosely*, ___ U.S. ___, 96 S. Ct. 321 (December 9, 1975). The court did not discuss the possibility that such statements could not be used for other purposes. I do not, however, regard that distinction as controlling. The basic purpose of the *Miranda* holding is to protect the individual's Fifth Amendment privilege against compelled testimonial self-incrimination unless the privilege is "knowingly and intelligently" waived, in recognition of the fact that custody creates an inherent compulsion on an individual to incriminate himself in response to questions. A statement which provides probable cause for a

subsequent search of a suspect's home or motor vehicle is, when the search results in the discovery and seizure of incriminating evidence, a self-incriminating statement in any real sense. I assume that there might be cases in which the interests of the integrity of the judicial process would require suppression, not only of the statement, but also of the fruits of the subsequent search. I do not believe, however, that this is such a case.

The exclusionary rule that precludes the admission in evidence of illegally obtained evidence is designed to deter police from violating the constitutional rights of persons suspected of crime. Thus, an involuntary statement coerced from a defendant may not be used as evidence against him, no matter how accurate the contents of the statement may prove to be. The *Miranda* holding extends that principle to exclude even voluntary statements of a suspect in custody, unless that suspect has been given the specified warnings and has waived his right to silence and to the assistance of counsel. I do not believe, however, that the prophylactic approach of *Miranda* must or should be extended to exclude evidence obtained as an indirect result of a suspect's in-custody statement, where there has been no purposeful attempt to subvert the defendant's rights. Compare *Brown v. Illinois*, *supra*.

The Supreme Court of the United States has stated in *Nardone v. United States*, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266:

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

That language was recently quoted with approval in *Brown v. Illinois, supra*.

The court has also said,

"Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings." *United States v. Callandra*, 414 U.S. 338, 348.

And, more to the point in my opinion:

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent conduct which has deprived the defendant of his rights. Where the officer's conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan v. Tucker*, 417 U.S. 433, 447.

In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*. The defendant's rights were read to him on no less than three occasions, and the officers made no attempt whatever to interrogate him with regard to the crime for which he was initially arrested. The only interrogation of the defendant consisted of a single question which was put to him after the marijuana cigarette was discovered in his shirt pocket, and after he had been read the warnings for the third time. Furthermore, that question was in response to an unsolicited statement by the defendant to the effect that he did not regard possession of the single cigarette as a crime. It is noteworthy, I think, that Trooper Talliaferro refused to extend the conversation, although the defendant

offered to volunteer further information which might well have led to further self-incrimination. I am satisfied that Trooper Talliaferro asked the single question as a natural consequence of the immediately preceding events, and without any conscious intent to deny the defendant his right to silence or his right to the assistance of counsel.

Although I am unable to find that the defendant had "knowingly and intelligently" waived his right to silence or to the assistance of counsel when he stated that more marijuana could be found in his vehicle, it is clear that no actual coercion, other than that inherent in his in-custody status, was applied by the police to obtain that information. As noted above, the information was given in response to a single question and in the course of a short conversation initiated by the defendant himself. Under these circumstances, I do not believe that exclusion of the evidence seized from the defendant's vehicle would serve as a deterrent to future police misconduct, for there was no conscious police misconduct in this case. Exclusion of this evidence could only serve to defeat the ends of justice with no corresponding benefit to the integrity of our judicial system. I do not believe that *Miranda* should or will be stretched that far.

Accordingly, it is ordered

(1) That the motion to suppress evidence, insofar as it related to any oral statements made by the defendant while in custody, is allowed.

(2) That the motion to suppress evidence, insofar as it relates to the property seized from the defendant's motor vehicle in the execution of the search warrant, is denied.

JOHN F. MORIARTY,
Justice of the Superior Court.

Entered: January 29, 1976.